Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ROBBYN BROWN,

Petitioner

v.

JOHN H. SNOW, et al,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI - APPENDIX

Robbyn Brown, Pro Se
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APPENDIX

ROBBYN BROWN, Plaintiff-Appellant, v.
JOHN W. SNOW, Secretary of the Treasury, et al., Defendants-Appellees.

No. 03-2181

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

March 19, 2004 *, Submitted
April 6, 2004, Decided

* After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

NOTICE: RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Illinois. No. 99-CV-0745. David R. Herndon, Judge.

DISPOSITION: Affirmed.

COUNSEL: ROBBYN BROWN, Plaintiff - Appellant, Pro se, O'Fallon, IL USA.

For JOHN W. SNOW, DORIAN MORLEY, DELORIS FEATHERSTONE, KATHLEEN SWAIN, Defendants - Appellees: Nicholas P. Llewellyn, OFFICE OF THE UNITED STATES ATTORNEY, St. Louis, MO USA.

JUDGES: Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge.

OPINION:

ORDER

In 1996, Robbyn Brown, an accountant employed by the Internal Revenue Service in southern Illinois, applied for a promotion to the position of Temporary Grade 13 Revenue Agent. Her qualifications were good--on a scale of 1 to 5, her employee evaluations were in the 4-5 range. But the position went to Tim Neighbors, a white co-worker whose score in the comparative ranking for the position was higher than Brown's. The episode repeated itself in 1998, when there was an opening for the same position on a permanent basis. Neighbors was again selected over Brown--not surprisingly, given that he had by then been doing identical work in the temporary position for two years.

Brown, however, was convinced that neither of the decisions was justified and that the IRS had discriminated against her as a black woman, in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. 2000e et seq.* Specifically, she believed that her manager, Richard Knowles, had deliberately and discriminatorily given easier assignments to Neighbors, helping him to compile a better work record--and thus obtain an unfair advantage--in the period leading up to the 1996 promotion. She contacted an EEO counselor about her concerns soon after the 1996 decision, and eventually filed a series of formal EEO complaints with the Regional Complaint Center of the

Department of the Treasury. After the Center issued its final agency decision in June 1999, Brown filed a lawsuit in the district court.

Brown's fourteen-count complaint was centered on the 1996 and 1998 promotion decisions, but it encompassed a number of related issues as well. Several counts, brought under Title VII, concerned actions taken before the promotion decisions--primarily Knowles giving easier assignments to Neighbors--while others focused on events following Brown's initiation of EEO activity, including various forms of alleged retaliation--such as negative performance evaluations, refusal to give her desirable "acting manager" assignments, and denial of extra pay for work above her pay-grade level. In addition to these claims, Brown alleged that Kathleen Swain, who replaced Knowles as her manager in 1996, violated the Privacy Act, *5 U.S.C. § 552a*, by disclosing materials from Brown's EEO file. Finally, she alleged that various constitutional violations--primarily the denial of due process and equal protection--were committed in the course of the EEO investigation.

Of the complaint's fourteen counts, some were dismissed, others were disposed of at summary judgment, and the remainder went to trial. The district court dismissed the constitutional claims, pointing out that Title VII is the exclusive remedy for federal employees alleging discriminatory employment practices. *See Brown v. General Services Administration, 425 U.S. 820, 835, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976).* The court also dismissed the claims that Knowles had treated Brown unfairly before the 1996 promotion decision, finding that Brown failed to exhaust her administrative remedies because she did not contact an EEO counselor within 45 days of the alleged events. *See 29 C.F.R. § 1614.105(a)(1).*

After discovery, the defendants moved for summary judgment on the counts of improper disclosure under the

Privacy Act. The court considered the two alleged instances of disclosure: (1) Swain asking a co-worker, Cheryl Pagan, to proofread her responses to a questionnaire given to her in connection with Brown's EEO claim (which Pagan declined to do, and consequently never saw either the questionnaire or Swain's responses); (2) another co-worker, Karen Hudgins, seeing what she vaguely described as "something relating to an EEO file" but which was never identified nor shown to have been part of Brown's EEO file. Finding that neither of these events was a "disclosure," the court granted the motion for summary judgment on the Privacy Act claims. The court also granted summary judgment on the counts alleging discrimination and retaliation through negative performance evaluations and various forms of "increased work scrutiny" because, the court found, these did not amount to adverse employment actions.

The remaining counts (involving the 1996 and 1998 promotion decisions, the denial of acting manager assignments, and the denial of proper compensation for higher grade duty work) went to trial. After the evidence was presented, the court concluded that Brown "failed to establish a prima facie case" for any of the remaining counts: the evidence showed that Neighbors was more qualified than Brown for the positions in 1996 and in 1998; that the denial of acting manager assignments was not an adverse employment action; and that Brown was not entitled to increased pay for the higher grade-level assignments she had worked on. The court therefore granted the defendants judgment as a matter of law.

Brown's chief argument on appeal is that the evidence she presented did make out a prima facie case that the Department's promotion decisions were discriminatory. (She does not present any cogent argument challenging the court's other post-trial conclusions.) A prima facie case is, of course, the first step of the familiar *McDonnell Douglas* indirect

method of proof. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* However, as we have repeatedly emphasized, the burden-shifting method of *McDonnell Douglas* is appropriate only for purposes of summary judgment; after the evidence has been presented at trial, the question is simply whether that evidence is sufficient to allow a reasonable jury to find in favor of the plaintiff. *See Staples v. Pepsi-Cola Gen. Bottlers, Inc., 312 F.3d 294, 299 (7th Cir. 2002); Hall v. Gary Cmty. Sch. Corp., 298 F.3d 672, 675 (7th Cir. 2002).* So although the district court framed its conclusion in terms of whether Brown made out a prima facie case, on review we need only ask whether the evidence reasonably supports Brown's claims.

Under either standard, however, it is clear that the evidence in this case does not support Brown's allegation that the Department's promotion of Neighbors was discriminatory: it is undisputed that Neighbors' rating was better than Brown's. Brown argues, nevertheless, that Neighbors' superior rating was made possible only by Knowles' favoritism toward him in the distribution of assignments--that, in effect, she was "set up to fail" in comparison. *See Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 746 (7th Cir. 2002); McPhaul v. Bd. of Comm'rs of Madison County, 226 F.3d 558, 565 (7th Cir. 2000).* But although Brown spent much of the five-day trial trying to show the connection between the assignments Neighbors received and his ultimate ranking, the court found there to be no objective evidence of such a connection, concluding that Brown was "the only one [of those who testified] that seemed to believe that [Neighbors' assignments] were ... easier cases." Brown tries to refute this conclusion by restating her belief that the assignments given to Neighbors allowed him to obtain an artificially high rating. However, absent any showing that those assignments were motivated by racial preference or animus, *see McPhaul, 226 F.3d at 565*, this

conclusory assertion is not enough to overcome judgment as a matter of law.

Brown also challenges the district court's grant of summary judgment on her Privacy Act claims. The Privacy Act, *5 U.S.C. § 552a(b)*, prohibits an agency from "disclosing any record which is contained in a system of records" without authorization. *See United States Dep't of the Navy v. Fed. Labor Relations Auth., 975 F.2d 348, 350 (7th Cir. 1992)* The district court found no evidence that any such record was ever disclosed, given that Pagan never looked at the documents Swain asked her to proofread and that Hudgins could neither identify the document she saw nor affirm that it came from Brown's EEO file. Brown suggests that by requiring her to identify a specific document, the court placed an unwarranted burden on her to "know when or have an inventory of what contents were disclosed." But the burden is on the plaintiff at the summary judgment stage to come forward with specific evidence in the record that supports her claim and creates a genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Morfin v. City of East Chicago, 349 F.3d 989, 1002 (7th Cir. 2003).* Because Brown was unable to do this, summary judgment was proper.

Brown's other arguments are less fully developed. She suggests that the district court incorrectly concluded that a negative performance evaluation was not an adverse employment action. She argues that the court focused only on the numerical aspect of the evaluation, which was favorable to her, and ignored the "negative and vindictive narrative" accompanying those numbers. But she doesn't even tell us what that narrative said, let alone show how it was vindictive and negative. So even assuming that a negative performance evaluation can be an adverse action for Title VII purposes (though it generally cannot, *see Johnson v. Cambridge*

Indus., Inc., 325 F.3d 892, 902 (7th Cir. 2003)), we have no basis for disagreeing with the district court's conclusion.

Brown's remaining arguments concern administrative matters (such as discovery and sanctions) over which the district court has broad discretion, *see United States v. Pearson, 340 F.3d 459, 467 (7th Cir. 2003)* (discovery); *Cerutti v. BASF Corp., 349 F.3d 1055, 1067 (7th Cir. 2003)* (sanctions), and she presents nothing to convince us that the court abused that discretion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MINUTES OF JURY TRIAL

DATE: February 14,2003 DAY: 5 (last)
CASE NO. 99-745-DRH
PRESIDING: David R. Herndon
(Filed February 14, 2003)

ROBBYN BROWN, Plaintiff vs. Lawrence H. Summers, et al, Defendant

CASE NO. 99-745-DRH

REPORTER: /s/ Laura Blatz
COURTROOM DEPUTY: Patty Brown
CONVENED: 9:00
ADJOURNED: 5:30

CIVIL: X

RECESS: 12:30 – 1:30

Counsel for Plaintiff(s): Robbyn Brown
Counsel for Defendant(s): Nicholas Llewellyn

* * *

COMMENTS:

Motion for judgment as a matter of law is argued and granted. Court finds that plaintiff has failed to establish a prima facie case of race or sex discrimination. Court dismisses Counts 5, 9, 10 & 11.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH

JUDGMENT IN A CIVIL CASE

(Filed February 25, 2003)

JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and are now before the Court on Defendant John Snow's motion for judgment as a matter of law.

IT IS ORDERED AND ADJUDGED for the reasons stated on the record in open court that the Defendant's motion is **GRANTED** and Counts V, IX, and XI are **DISMISSED**. Judgment is entered in favor of Defendant **JOHN W. SNOW**, Secretary of the Treasury, and against Plaintiff **ROBBYN BROWN.**

IT IS FURTHER ORDERED AND ADJUDGED that all remaining counts against all Defendants are **DISMISSED.** Judgment is entered in favor of Defendants **JOHN W. SNOW, DORIAN MORLEY, DELORIS FEATHERSTONE AND KATHLEEN SWAIN** and against Plaintiff **ROBBYN BROWN.**

NORBERT G. JAWORSKI, CLERK
By /s/ Patty Brown
Deputy Clerk

EOD 2-27-03

February 25, 2003

/s/ David R. Herndon
DAVID R. HERNDON
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. Lawrence H. Summers, et al, Defendant
CASE NO. 99-745-DRH

ORDER

(Filed January 10, 2001)

Before the Court is plaintiff's Robbyn Brown's, Motion for Protective Order (Doc. 46), filed November 29, 2000. Plaintiff moves the Court to enter a Protective Order to govern the release to plaintiff of material protected by the Privacy Act, **5 U.S.C. § 552 *et seq.*** Defendants do not oppose a Protective Order and submit a proposed Protective Order.

5 U.S.C. § 552a(b) provides as follows:

Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be-

* * *

(11) pursuant to the order of a court of competent jurisdiction;...

5 U.S.C. § 552a(b). The Privacy generally prohibits the federal government from disclosing personal information about an individual without the individual's consent, **5 U.S.C. § 552a(b)**, but contains an exception for disclosure of information pursuant to court order. Congress enacted the

Privacy Act in order to protect the privacy of personal and financial data maintained in federal information systems. The Act regulates the "collection, maintenance, use, and dissemination of information by such agencies." ***Kimberlin v. U.S. Dept. of Justice,* 788 F.2d 434,436 (7th Cir.1986) (citing Statement of Purpose of Dec. 31, 1974, Pub.L.No. 93-579, §2, 88 Stat. 1896).**

Rule 26(c) of the Federal Rules of Civil Procedure that protective orders are to be entered for "good cause." The determination of good cause is within the discretion of the Court and cannot be left to the parties, and a showing of particularized good cause must be made. In ***Citizens First National Bank of Princeton v. Cincinnati Insurance Co.,* 178 F.3d 943 (7th Cir. 1999),** the Court of Appeals for the Seventh Circuit stated,

It is true that pretrial discovery, unlike the trial itself, is usually conducted in private. But...the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. That interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interest predominate in the particular case, that is, only if there is good cause for sealing a part or whole of the record in that case.

***Citizens First National Bank,* 178 F.3d at 944-45 (internal citations omitted).**

Although judicial proceedings are public rather than private property and court records and decisions are to be as open as possible, the Court finds that, in this instance, plaintiff and defendants have shown good cause for the entry of a Protective Order. The category of documents protected is sufficiently narrow and said documents are statutorily

protected from disclosure. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that plaintiff's, Robbyn Brown's, Motion for Protective Order (Doc. 46) be GRANTED. The Court hereby adopts and enters Protective Order submitted by defendants.

IT IS SO ORDERED.
Dated this 10th day of January, 2001.

/s/ Gerald B. Cohn
GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE

[Doc. 52]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY

(Filed February 06, 2001)

On September 30, 1999, Plaintiff Robbyn Brown, *pro se*, an employee of the Internal Revenue Service ("IRS"), filed a fourteen-count complaint against Lawrence H. Summers, Secretary of the Treasury; Dorian Morley, Director, Regional Complaints Center; Deloris Featherstone; and Kathleen Swain, et al. In Counts I through V, and Counts IX and XI, Plaintiff maintains that the IRS discriminated against her on the basis of her race and gender. In Counts VI, VII, and X, Plaintiff maintains that the IRS retaliated against her for having exercised her federally protected rights under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et. seq., and The Civil Rights Act of 1991, 42 USC § 1981a. In Count VIII, Plaintiff maintains that Defendants Featherstone and Swain conspired to deny her due process and equal protection under the laws in violation of 42 USC §§ 1981, 1983, and 1985. In Counts XII and XIII, Plaintiff maintained that Defendants violated the Freedom of Information Act, 5 U.S.C, § 552 et seq., ("FOIA") and the Privacy Act, 5 U.S.C. § 552a et. seq. by disclosing the contents of Brown's discrimination action and stating false information to her colleagues. In Count XIV,

Plaintiff maintains that Defendant Morley violated and abused her delegated duty under 29 C.F.R. 1614 in the processing of Plaintiff's complaints by improperly denying Plaintiff the full and equal benefit of all laws and proceedings as provided by 42 U.S.C. 1981 and rights and privileges expressed in 42 U.S.C. § 1983.

After having previously served Defendants with her Initial Disclosures, Plaintiff served Defendants a forty-four item Discovery Request on March 16, 2000 (Plaintiff's Exhibit A). According to AUSA Llewellyn, the discovery request was received on March 20, 2000.

On April 27, 2000, prior to the commencement of the Scheduling and Discovery Conference before Honorable Judge Gerald B. Cohn, AUSA Llewellyn passed Plaintiff the Defendants' Initial Disclosures and three (3) items from the March 16, 2000 Discovery Request.

During the Scheduling and Discovery Conference held in Judge Cohn's chambers, AUSA Llewellyn requested an extension of the 30-day time period for responding to Plaintiff's discovery request. This time for responding had already expired. AUSA Llewellyn stated he needed additional time to respond due to some of the information needing to be redacted to remove identifying information.

AUSA Llewellyn had previously advised Plaintiff that attorneys for the IRS were gathering the information. Plaintiff had refused AUSA Llewellyn's request for an extension on the grounds that the IRS had purportedly done an investigation of most of the matters doing the administrative processing of the complaints over a 3-year period. Therefore, most of the information sought should have been readily available or easily retrieved. Plaintiff having been in the latter stages of her pregnancy, needed the

information to adequately prepare the case prior to going on maternity leave.

On May 26, 2000, AUSA Llewellyn mailed Plaintiff two additional items from the March 16, 2000 Discovery Request, in excess of sixty days after the request was served. (Plaintiff's Exhibit B)

On July 31, 2000 at approximately 02:45 p.m., Plaintiff (while on maternity leave) and AUSA Nicholas Llewellyn held a telephone conference to discuss Plaintiff's March 16, 2000 discovery request pursuant to Local Rule 37.1 of the Federal Rules of Civ. Proc. Plaintiff and AUSA Llewellyn went over the first twenty-five items. Objections to the remaining items were similar to the objections Plaintiff and AUSA Llewellyn had previously discussed. AUSA was to confer with IRS Counsel to determine what items they would be releasing. To date, no additional information has been provided.

On October 03 – 04, 2000, during AUSA Llewellyn's taking of Plaintiff's deposition, Plaintiff again inquired as to the status of the information requested.

By letter dated November 13, 2000 served on Defendants' Counsel, Plaintiff attempted to schedule dates to depose Defendants prior to the December 01, 2000 deadline approved by this Court. (Plaintiff's Exhibit C). Plaintiff spoke with AUSA Llewellyn later that evening and was provided his dates of availability subject to IRS Counsel's availability. Plaintiff mailed AUSA Llewellyn a letter on November 14, 2000 confirming this conversation and expressing concern about meeting the December 01, 2000 deadline given their limited availability. (Plaintiff's Exhibit D).

On November 17, 2000 Plaintiff deposed two non-party witnesses. At the conclusion of the last deposition, Plaintiff again inquired as to the status of additional documents to be provided.

On November 29, 2000, Plaintiff served Defendants a second Discovery Request for records, to which AUSA Llewellyn responded on January 02, 2001 (Plaintiff's Exhibits E and F).

On January 10, 2001, this Court granted Plaintiff's request for a Protective Order for statutorily protected information (Doc. 52). The Protective Order (Doc. 56) allows Defendants to release information that is protected by the Privacy Act and/or Title 26. In response to same, Plaintiff phoned AUSA Llewellyn on January 17, 2001 to inquire as to what additional information would be provided and when. AUSA Llewellyn suggested Plaintiff make her request in writing. Viewing this as another by Defendants to stonewall, Plaintiff declined.

AUSA Llewellyn advised Plaintiff by letter dated January 24, 2001 that Defendants will not be made available for depositions nor would any records be provided absent a Court Order (Plaintiff's Exhibit G). This is contrary to his earlier statement that Defendants would be available for deposing during the week of January 30, 2001. This also defies the Protective Order previously issued by this Court.

AUSA Llewellyn in response to Plaintiff's Discovery Requests raised the following objections:

1. The request seeks documents subject to the Privacy Act, 5 U. S. C. § 552a, which may not be produced in the absence of an authorization from the person to whom the records pertain or a court order or an Agreed Motion for

Protective Order.

2. Most of the requested documents would contain taxpayer information that is protected from disclosure by 26 U. S. C. § 6103.

3. The request is overly broad as it seeks information for employees other than grade 12 revenue agents.

4. To the extent the request encompasses employees other than grade 12 revenue agents, it seeks documents which are neither relevant in themselves nor reasonably calculated to lead to the discovery of admissible evidence.

5. To the extent the information could be retrieved electronically, the request is overly burdensome. The database on which the IRS maintains the requested information only contains the requested information on cases that are open or which have been closed within the last 400 days; after that time, the information is archived into files which are saved on tapes in Houston. In order to query the requested information, all the data from the tapes would have to be restored and then queried. This would be a very time-consuming undertaking, and it is not even certain when or if appropriate hardware would be available for doing so. Alternatively, to answer this request without using the database would require reviewing independently each of the case records for hundreds or thousands of cases.

6. All responsive documents have been purged in the ordinary course of business pursuant to IRS policies and procedures for the retention and destruction of documents.

DISCUSSION

The Equal Employment Opportunity Commission is authorized to issue rules, regulations, orders, and instructions pursuant to section 717(b) of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 2000e-16(b). Pursuant to that authority, the EEOC issues its Management Directive. EEOC Management Directive 110 (MD – 110) states that the purpose of the Directive is to provide federal agencies with Commission policies, procedures, and guidance relating to the processing of employment discrimination complaints governed by the Commission's regulations in 29 C.F.R. Part 1614. In its address to the heads of federal agencies, MD-110 states, "Since the commission's guidance is binding in nature, federal agencies are required to comply with it".

Section 1614.108(b), of Title 29 C.F.R., requires that "the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint." An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

Section VI-D of Chapter 6 of the MD-110 provides that the investigator must be thorough. Further, the Investigator must identify and obtain all relevant evidence from all sources regardless of how it may affect the outcome. Section VII-C(4) of Chapter 6 of the MD-110 provides that all relevant documents must be obtained. [Emphasis added]

With respect to Defendants' objections 1 and 2, these are moot in that this Court has entered a Protective Order that would allow their release.

With respect to Defendants' objection 3, Section VII-B(1) of EEOC MD 110 Chapter 6 provides that comparative

evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the EEOC. It states:

In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment as the complainant in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination case involving the approval of annual leave where the same rules are applied to both by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator would be obligated to find out whether there were persons, not named by the complainant but similarly situated, whose treatment could be compared to the complainant's treatment.

Accordingly, the nexus for retaliation is whether Defendants treated Plaintiff differently from other employees who had not previously filed EEO complaints.

With respect to Defendants' objection 4, Plaintiff previously set out the relevance and necessity of the information sought during the administrative processing of the case. (Plaintiff's Exhibit H)

With respect to Defendants' objections 5 and 6, Plaintiff responds that she requested most of this information during the administrative processing of this case. During that time, she also expressed her concerns about the information being purged or destroyed. (Plaintiff's Exhibit H) Although complying with the discovery request may be

burdensome, the information's relevancy and utility to the Plaintiff outweighs the burden to the defendant. Burns v. Thiokol chem. Corp. 483 F. 2d 300, 306 (5th Cir. 1973). In the event the records are no longer available, Plaintiff requests this Court invoke 29 C.F.R. 1614.108(c)(3) which provides that the decisionmaker should in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party, etc.

WHEREFORE, for the above stated reasons Plaintiff pray this Court grants her motion and directs Defendants to produce the records requested within ten (10) days from the date of the Order and make known, available dates for the taking of their depositions.

Prayerfully submitted,
BY: /s/ Robbyn Brown

Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 74]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. Lawrence H. Summers, et al, Defendant
CASE NO. 99-745-DRH

ORDER

(Filed February 28, 2001)

Before the Court is Plaintiff's Motion to Compel Discovery (Doc. 68), filed February 6, 2001. Plaintiff, Robbyn Brown ("Brown") moves the Court to enter an Order compelling defendants to produce documents requested in her Discovery Requests of March 15, 2000, and November 20, 2000, and to be available for plaintiff to take their depositions.

In support of her Motion, Brown states that she has not been allowed to depose defendants pursuant to her November 13, 2000, request. She further states that defendant has refused to release certain information to corroborate her Complaint.

Defendants respond that any delay in the discovery process regarding depositions was caused by plaintiff's own inaction. Plaintiff took three depositions on November 17 and 20, 2000, and did not request the deposition of another specific individual until January 17, 2001. The discovery deadline in this matter was December 29, 2000, and continuances have been denied. Regarding written discovery, defendants state that defendants' counsel held a lengthy telephone conversation with Brown which covered twenty-five of Brown's forty-four requests. The conversation ended in defendants' counsel advising Brown

that he would need to review Brown's position with IRS counsel and with Brown advising that she would submit her position in writing. Defendants state that Brown failed to set out her specific dispute with any discovery request and seeks relief on the basis that defendants have stonewalled on discovery.

It is well-established that the court has broad discretion in the conduct of pre-trial discovery procedures. Court-ordered discovery deadlines cannot be ignored with impunity. Discovery in this matter was to have been completed by December 29, 2000. The Court has twice granted motions for continuances in the deadline for deposition of the parties, eventually extending said deadline four months. Brown fails to provide any reason, much less good cause, for her failure to seek defendants' depositions prior to the discovery cut-off. Further, she provides no reason for her failure to follow through on disputes regarding written discovery as required by **Fed. R. Civ. P. 37** and **Local Rule 37.1**. The parties have had more than adequate time to conduct thorough discovery. The Court has denied further continuances and will not further extend discovery. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that Plaintiff's Motion to Compel Discovery (Doc. 68) be DENIED.

IT IS SO ORDERED.
Dated this 27th day of February, 2001.

/s/ Gerald B. Cohn
GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE

[Doc. 82]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH
(Filed 03/20/2001)

OBJECTION TO DENIAL OF MOTION TO COMPEL DISCOVERY AND REQUEST FOR RECONSIDERATION

COMES NOW, Plaintiff Robbyn Brown, Pro Se, pursuant to Fed. R. Civ. P. 72(a), respectfully requesting reconsideration and modification of Magistrate Judge Cohn's Order entered February 28, 2001 denying my Motion to Compel Discovery. In support of such, I state as follows:

1. I'm filing this request within the extended time period graciously afforded by the Court.

2. I have worked diligently on this case as corroborated by the attached timeline (Plaintiff's Exhibit A) and have not lacked initiative as stated by Defendants in their Opposition to Plaintiff's Motion to Compel Discovery.[1]

3. I have not had adequate time within which to depose Defendants or non-party witnesses due to maternity leave and variables outside of my control (i.e. health reasons and Defendant's Counsel unavailability and refusal to extend the deadline for doing so accordingly).

4. This Court granted my Motion for a Protective Order in order to facilitate Defendants' release of protected information. However, AUSA Llewellyn in Defendants' Opposition to Plaintiff's Motion to Stay Proceedings, states "Plaintiff is not entitled to continue to pursue depositions or documents". He has thereby made the Court's Protective Order, (which requested before the discovery deadline but not issued until after the discovery deadline), moot.

5. I would be unduly prejudiced without the opportunity to depose Defendants and potential non-party witnesses to refute the Defendants' testimony.

6. The denial of my Motion to Compel Discovery places an unduly harsh result upon me thereby in effect precluding full consideration of the merits of my case.

7. My Memorandum of Law in support of my Objection to Denial of Motion to Compel Discovery and Request for Reconsideration is attached.

Wherefore, I respectfully request reconsideration and modification of the Order signed by Judge Cohn denying her Motion to Compel Discovery.[2]

Prayerfully submitted,
BY: /s/ Robbyn Brown
Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

BROWN v. SUMMERS, et al.
99-745-DRH

DATE	ACTION TAKEN
September 30, 1999	Complaint filed.
January 18, 2000	Partial answer by Defendant Summers.
February 22, 2000	Approved Scheduling and Discovery Order
March 06, 2000	Plaintiff served Defendant her Initial Disclosures
March 16, 2000	Plaintiff served Defendant a Discovery Request
April 27, 2000	Hearing on scheduling conference. Defendant provides Plaintiff with its Initial Disclosures and three items from the March 16, 2000 Discovery Request. Defendants are granted 30 additional days to respond to the Discovery Request.
May 26, 2000	Defendants file Answer to Counts VIII, IX, XII, XIII, and XIV.

May 30, 2000	One additional item received from Defendants in response to Plaintiff's March 16, 2000 Discovery Request.

[PLAINTIFF'S ATTACHMENT – A1]

May 31, 2000	Defendant filed Motion to Modify Approved Scheduling and Discovery Order requesting Plaintiff's deposition deadline be extended to October 01, 2000.
June 02, 2000 - October 16, 2000	Plaintiff goes on maternity leave.
July 28, 2000	Plaintiff and AUSA Llewellyn hold telephone conference to go over Discovery Request. AUSA Llewellyn stated he would discuss with IRS Counsel and get back with Plaintiff as to any additional information that would be forthcoming.
October 01, 2000	Deadline for Plaintiff's deposition.
October 03 - 04, October 04, 2000	Plaintiff deposed by AUSA Llewellyn.
November 13, 2000	Plaintiff sends AUSA letter requesting available dates for deposing Defendants. (Exhibit B)
November 14, 2000	AUSA Llewellyn and Plaintiff discuss his available dates for deposing

	Defendants. The dates are contingent upon the availability of IRS Counsel. Plaintiff sends AUSA Llewellyn a letter confirming this conversation. (Exhibit C)
November 17, 2000	Plaintiff deposed two non-party witnesses with AUSA Llewellyn and IRS Counsel, Dee Jarrett Dow present. Ms. Dow states she is unavailable the week of November 27, 2000 due to family matters.

[PLAINTIFF'S ATTACHMENT – A2]

November 20, 2000	Plaintiff deposed one non-party witness with AUSA Llewellyn present and Ms. Dow participating via speakerphone. AUSA Llewellyn refuses to extend the December 01, 2000 deadline unless Plaintiff agrees to limit the number of depositions. Plaintiff refuses pursuant to Local Rule 30.1.
November 21, 2000	AUSA Llewellyn is not available as previously stated.
November 22, 2000	AUSA Llewellyn is not available as previously stated.
November 23, 2000	Thanksgiving
November 24, 2000	AUSA Llewellyn is not available as

previously stated.

November 27, 2000 — AUSA Llewellyn is available but Ms. Dow is not as previously stated.

Plaintiff files a Motion to Modify the Approved/Scheduling Discovery Order due to AUSA Llewellyn's refusal to extend the date by the Court's December 01, 2000 deadline.

November 28, 2000 — AUSA Llewellyn is available but Ms. Dow is not as previously stated.

Plaintiff files a Motion for a Protective Order to facilitate Defendants' release of protected information.

[PLAINTIFF'S ATTACHMENT – A3]

November 29, 2000 — Neither AUSA Llewellyn nor Ms. Dow is available as previously stated.

November 30, 2000 — Neither AUSA Llewellyn nor Ms. Dow is available as previously stated.

December 01, 2000 — Neither AUSA Llewellyn nor Ms. Dow is available as previously stated.

December 07, 2000 — AUSA Llewellyn files Defendants' Response to Plaintiff's ("Second") Motion to Modify Approved Scheduling and Discovery Order. In paragraph 3 of his motion, AUSA Llewellyn expresses concern about any

	depositions being taken before December 31, 2000 due to potential "use or lose" annual leave some employees may have had.
December 14, 2000	Plaintiff files Motion Seeking Leave to Amend Motion to Modify Approved Scheduling and Discovery Order to request a change in the language of the proposed order. In paragraph 1 in support thereof, she stated AUSA Llewellyn had not contacted her to date with available dates for deposing the Defendants.
January 10, 2001	Court grants Plaintiff's Motion for Protective Order. [Doc. 85]

[PLAINTIFF'S ATTACHMENT – A4]

[Doc. 85]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH
(Filed 03/20/2001)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OBJECTION TO DENIAL OF MOTION TO COMPEL DISCOVERY AND REQUEST FOR RECONSIDERATION

COMES NOW, Plaintiff Robbyn Brown, Pro Se, pursuant to Fed. R. Civ. P. 72(a), respectfully requesting reconsideration and modification of Magistrate Judge Cohn's Order entered February 27, 2001 denying my Motion to Compel Discovery. In support of such, I state as follows:

March 16, 2000 Discovery Request

On March 16, 2000 I served AUSA Llewellyn with a 44-item request for records. Upon extension by the Court, AUSA Llewellyn responded on May 26, 2000. The response was not received until a few days before I went into labor. While on maternity leave, I discussed at least twenty-five of the items requested with Mr. Llewellyn for which Mr. Llewellyn stated he would confer with IRS [1] Counsel Denise Jarrett Dow. A dispute exists as to whether I was to provide a response to the remaining items before or after he had conferred with IRS Counsel. I maintain he was to have provided a response from Counsel prior to my addressing the other items. He maintains I was to have provided a response

prior to his conferring with IRS Counsel. (Government Exhibit AA – Deposition of Robbyn Brown, pages 266-268). Whereby I agreed to limit my request to the years 1993 and forward with stipulations attached, (the 1995 evaluation covered the period March 1, 1994 – March 31, 1995), no other accord could be reached.

Request to AUSA Llewellyn to Depose Defendants

At the conclusion of the deposition of two non-party witnesses on November 17, 2000, AUSA Llewellyn, IRS Counsel Denise Jarrett Dow and I discussed their availability and the Defendants availability for the taking of Defendants' depositions. Ms. Dow stated that as Counsel for the IRS, she would have to be present when the Defendants were deposed. Due to family arrangements she could not be present the weeks of November 20, 2000 and November 27, 2000. When I refused to agree to AUSA Llewellyn's request to limit the number of depositions I planned to take to ten, he refused to agree to extend the December 01, 2000 deadline date for deposing the Defendants. This was despite the fact that I was available at the time.

November 29, 2000 Discovery Request

The November 29, 2000 Discovery Request was faxed to AUSA Llewellyn to allow the 30-day response time before the discovery deadline. . To facilitate the Defendants' release of statutorily protected information, a Motion for Protective Order was filed simultaneously. AUSA Llewellyn [2] responded via mail on January 02, 2001. The Discovery Request listed 15 items. For each of the first 14 items sought, AUSA Llewellyn cited the Privacy Act protection. In that a Motion for a Protective Order was pending, there was no need to contact AUSA Llewellyn.
The first 6 items consisted of requests for back-up tapes for

all VMS and/or e-mail messages for individuals named in the Complaint, to which Defendants suggested none existed. Defendants provided a web address for the seventh item. Item 8 consisted of a request for employee work folders for the named Defendants, some similarly situated employees, and potential witnesses. Items 9 and 10 requested the performance evaluations for Defendants Swain and Featherstone. In his response to items 9 and 10, AUSA Llewellyn stated specifically "Defendant avers that upon entry of a Protective Order, Defendant will produce the requested performance appraisals for the years stated if they are available back to 1995". Item 11 was a request for the performance appraisals for Defendant Dorian Morley. Items 12 – 13 were requests for information concerning the Regional Complaints Center. Item 14 was provided. Item 15 was a request for information for a similarly situated employee.

On January 10, 2001, this Court granted my Motion for a Protective Order. (Doc. 52). After allowing Defendants adequate time within which to provide the information (i.e., information for which their only objection was based upon statutory protection), I phoned AUSA Llewellyn to inquire as to what information would be provided and when. He suggested I put my request in writing. The Discovery Request having previously been sent to him in writing, I felt his request was burdensome and an attempt to delay the release of the information. Even though my motion to extend the deadline date for deposing the Defendants was pending, I took the opportunity during this telephone conversation to inquire if he would be making the Defendants available for [3] deposing. He stated he would and provided a time period for doing so. He withdrew that offer a week later prior to arrangements being finalized.

Discussion

The facts in this case are similar to the facts in Geschke v. CLDC Management Corporation, 956 F. 2d 272 (7th Cir. 1992). The Geshckes were pro se plaintiffs that had filed a motion to compel discovery after the discovery deadline had closed. The district court denied their motion to compel. The Seventh Circuit Court of Appeals found that the district court abused its discretion with respect to the discovery matters.

In Del Carmen v. Emerson Electric Co., 908 F. 2d 158, 161 (7th Cir. 1990), the Court found that the district court abused its discretion in dismissing the plaintiff's case. It stated that a dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailing.'"

Unless there is a clear record of delay or contumacious conduct or unless less drastic sanctions have proven unavailing, the policy favoring determination of cases on their merits outweighs the district court's understandable concern for clearing its docket.). Lowe v. City of East Chicago, 897 F. 2d 272, 274-275 (7th Cir. 1990). [4]

Wherefore, I respectfully request reconsideration and modification of the Order signed by Judge Cohn denying her Motion to Compel Discovery.

Prayerfully submitted,
BY: /s/ Robbyn Brown
Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 86]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. JOHN W. SNOW, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

CASE NO. 99-745-DRH
(Filed 11/28/2000)

PLAINTIFF'S MOTION TO MODIFY APPROVED SCHEDULING AND DISCOVERY ORDER

COMES NOW Plaintiff, Robbyn Brown, *Pro Se*, respectfully requesting modification of the amended Approved Scheduling and Discovery Order entered August 22, 2000, with respect to the Scheduling Plan, paragraphs 3 and 7, which now requires "3. Defendants' depositions shall be taken by December 1, 2000. 7. Discovery must be completed by December 29, 2000." Plaintiff respectfully requests the Court to expand said date of depositions to January 05, 2001 and to expand the Discovery completion date to March 06, 2001. In support thereof, Plaintiff states as follows:

1. The initial Scheduling Plan was agreed to on February 17, 2000 by Plaintiff and by Defendants' former counsel, William E. Coonan, Assistant United States Attorney (AUSA) for the Southern District of Illinois,[1] whose Motion for Leave to Withdraw was granted by the Court on May 4, 2000.

[1] AUSA William Coonan's Motion for Leave to Withdraw was approved by this Court on May 04, 2000 after AUSA Nicholas Llewellyn had entered his appearance on behalf of Defendants.

2. By Order of this Court dated June 19, 2000, the initial Scheduling and Discovery Plan deposition dates were expanded upon motion by Defendants.

3. Plaintiff previously requested and received by Order of this Court expansion of the deposition dates due to Plaintiff having been on maternity leave.

4. The current Scheduling and Discovery Order as Amended provides that Defendants' depositions are to be completed no later than December 01, 2000.

5. Plaintiff by letter dated November 13, 2000 served on Defendants' Counsel has attempted to schedule dates to depose Defendants.

6. According to AUSA Nicholas Llewellyn and IRS Counsel, due to scheduling conflicts Defendants' depositions cannot be taken by the December 01, 2000 deadline.

7. During Plaintiff's deposing of a non-party witness on November 17, 2000, AUSA Nicholas Llewellyn agreed to expand the December 01, 2000 date provided Plaintiff agrees to limit her total depositions to no more than ten, to which Plaintiff refused.

8. Local Rule 30.1 of the Fed. R. of Civil Proc. states that this Court has opted out of Federal Rule of Civil Proc. 30(a)(2)(A). It states specifically, "In this District, there are no restrictions placed on the number or length of depositions unless ordered by the Court."

9. Upon deposing defendants, Plaintiff requires additional time in which to discover additional information that may be reasonably calculated to lead to the discovery of

admissible evidence.

10. Defendant will not be prejudiced by the expanded dates.

WHEREFORE for the above stated reasons, Plaintiff respectfully requests the Court grant Plaintiff's Motion.

Prayerfully submitted,
BY: /s/ Robbyn Brown

Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 45]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff, vs. LAWRENCE H. SUMMERS, et al, Defendants.

CASE NO. 99-745-DRH

(Filed 01/17/2001)

ORDER

Before the Court is Plaintiff's Motion to Modify Approved Scheduling and Discovery Order (Doc. 45), filed November 28, 2000. Plaintiff moves the Court to extend the current scheduling order approximately sixty (60) days. The Court is unwilling to continue this matter. Accordingly, the Court being fully advised in the premises,

IT IS THE ORDER of this COURT that Plaintiff's Motion to Modify Approved Scheduling and Discovery Order (Doc. 45) be DENIED. The parties are reminded that a settlement conference is set in this matter for January 23, 2001, at 1:30 P. M. and that settlement statements are now due.

IT IS SO ORDERED.
Dated this 17th day of January, 2001.

/s/ Gerald B. Cohn
GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE

[Doc. 55]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF RECOVERY OF COSTS AGAINST DEFENDANT KATHLEEN SWAIN FOR FAILURE TO WAIVE SERVICE OF SUMMONS

COMES NOW Plaintiff, Robbyn Brown, Pro Se, with her Reply Brief in support of her Motion for Recovery of Costs Against Defendant Kathleen Swain for Failure to Waive Summons pursuant to Rule 4(d)(5) of the Federal Rules of Civil Procedure. Whereby Reply Briefs are not favored, Plaintiff respectfully requests leave of this Court in these exceptional circumstances in responding to Defendant's Opposition.

Rule 4(d) of the Federal Rules of Civil Procedure provides-

> "If a defendant located within the United States fails to comply with a request for Waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown."

AUSA Nicholas Llewellyn in his opposition to

Plaintiff's Motion for Recovery of Costs, states as follows:

1. Defendant Swain informed him she never received the Waiver of Service,
2. Plaintiff cannot provide any evidence that Defendant Swain actually received the Waiver, and
3. Defendant Swain was not properly served.

All of the above are without merit.

A. Defendant Swain's Denial As To Her Receipt of the Waiver of Service

Plaintiff mailed postage paid, the Waiver of Summons (hereinafter referred to as Waiver) to Defendant Swain at her last known address, 15 Burcham Drive, Fairview Heights, IL 62208 via both certified mail and first-class mail. As late as September 21, 1999, Defendant Swain maintained this as her address. (Plaintiff's Exhibit-A attached, copy of envelope addressed by Defendant Swain). The Waiver sent via first-class mail was never returned. Several attempts were made by the Fairview Heights Post Office to deliver the Waiver sent via certified mail. The Post Office returned the certified mail stamped "Unclaimed" as opposed to "Wrong Addressee" or "Attempted Not Known". (Plaintiff's Exhibit – B attached, copy of front and back of certified mail which was returned).

AUSA Nicholas Llewellyn states in Defendant's opposition to Plaintiff's motion for recovery of costs that Defendant Swain [currently] lives in Missouri. He does not deny nor can he that Defendant Swain lived at or maintained the Fairview Heights address as her address of record at the time the Waiver was sent.

On February 17, 2000, during discussions with AUSA William E. Coonan[2] regarding the Joint Report of Parties and Proposed Scheduling and Discovery Order, Plaintiff advised Mr. Coonan that Defendants Morley and Featherstone had returned their Waivers of Service, but Defendant Swain had not. Mr. Coonan stated Plaintiff then would have to formally serve Defendant Swain and inquired if Plaintiff intended to serve Defendant Swain at her place of business. This conversation took place approximately two weeks before the deadline for returning the Waivers, more than enough time for Defendant Swain to have returned the Waiver.

Service under Rule 4(e) of the Federal Rules of Civil Procedure does not appear to allow service upon Defendants in their individual capacities to be made at their place of business. Accordingly on March 16, 2000, Plaintiff served Defendants a Discovery Request in which she requested in addition to other items, Defendant Swain's home address. To date, Defendants have refused to provide that information along with substantially all of the other information requested.

As to Defendant Swain's submission of an affidavit attesting to her not having received the Waiver, Plaintiff respectfully directs the Court's attention to Count VIII, Paragraph 8(b) of Plaintiff's Complaint that maintains Defendant Swain submitted false affidavits during the administrative processing of Plaintiff's case. In her initial affidavit dated June 26, 1997, Defendant Swain maintained she did not have knowledge of Plaintiff's EEO Complaint until July, 1996, (i.e. after Plaintiff's 1996 evaluation was prepared). In this affidavit, she also specifically lined out the

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[2] By order dated May 04, 2000, this Court granted AUSA William E. Coonan's motion to withdraw (Doc. No. 30)

"penalties of perjury" statement. In a subsequent affidavit submitted over one year later, Defendant Swain maintains she had knowledge of Plaintiff's EEO complaint as early as "May or June 1996" (i.e. prior to Plaintiff's 1996 evaluation having been prepared). The front and last pages of those conflicting affidavits are attached. (Plaintiff's Exhibit-C).

B. Defendant's Assertion That Plaintiff Cannot Provide Any Evidence That Defendant Swain Actually Received the Waiver

In response to Defendant's assertion that Plaintiff does not have any evidence that Defendant Swain actually received the Waiver, Plaintiff states that this defense was foreseen. Accordingly, she incurred the extra expense and duplication of effort of sending the Waiver postage paid by both first-class mail and certified mail to each of the Defendants in their individual capacities. The purpose of the delivery by first-class mail was to ensure Defendant Swain's receipt of the Waiver in the event she refused or intentionally did not claim the certified mail, which was the latter. Secondly, Rule 4(d)(2)(B) of the Federal Rules of Civil Procedure does not require Plaintiff to "provide evidence" that Defendant Swain actually received the Waiver; it states that the Waiver "shall be dispatched through first-class mail or other reliable means". Service via first-class mail does not provide the sender with proof of receipt. Certified mail usually does, when claimed.

C. Defendant Swain's Assertion That She Was Not Properly Served

In response to the assertion that Defendant Swain was not properly served, Plaintiff cites Rule 12(b) of the Federal Rules of Civil Procedure which provide that said defense should have been made in the responsive pleading. In his

Answer to Plaintiff's Complaint (Doc. No. 32), AUSA did not raise improper service as a defense. This defense is nevertheless moot in that although the St. Clair County Sheriff's Department stated in its Affidavit of Service that the documents were left with a person residing therein, it also followed up the hand-delivery by mailing a copy of the summons and the complaint to Defendant Swain. To date, these were also not returned. The St. Clair County Sheriff's Department's Affidavit of Service was previously filed with this Court.

Of particular note, Defendant Swain would have this Court believe she did not receive, nor was she aware of either of the Waivers sent. However, she did receive or was aware of the service made by the St. Clair County Sheriff's Department as evidenced by AUSA Llewellyn's assertion that the service by the Sheriff's Department was made upon her father. The Affidavit of Service does not state the recipient was Defendant Swain's father. Defendant Swain ostensibly, provided this information.

Wherefore, Plaintiff respectfully requests the Court grant her recovery of costs subsequently incurred in serving the summons upon Defendant Kathleen Swain pursuant to Rule 4(d)(5) of the Federal Rules of Civil Procedure.

Prayerfully submitted,
BY: /s/ Robbyn Brown
Robbyn Brown, Plaintiff
P.O. Box 0034
O'Fallon, Illinois 62269-0034
W: (618) 632-5691

[Doc. 41]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH

MEMORANDUM AND ORDER

(Filed 10/19/2000)

Herndon, District Judge:

Now before the Court is Brown's motion for recovery of costs against Defendant Kathleen Swain for failure to waive service of summons (Doc. 35). Specifically, Brown argues that pursuant to Federal **Rule of Civil Procedure** 4(d)(5), she is entitled to recover costs for Swain's failure to waive service. Swain responds that she has not received a request for waiver. Based on the following, the Court denies Brown's motion.

Brown moves, pursuant to **Fed.R.Civ.P.** 4(d)(5), to recover her costs incurred as a result of Swain's failure to waive service of summons. **Rule 4(d)** permits a plaintiff to avoid the costs of personal service by providing a defendant with written notice, through first-class mail or other reliable means, of the commencement of an action and with a request that defendant waive service of summons A defendant once notified "has a duty to avoid unnecessary costs of serving [1] the summons." **Fed.R.Civ.P, 4(d)(2).** The plaintiff "shall allow the defendant a reasonable time to return the waiver,

which shall be at least 30 days from the date on which the request is sent." **Fed.R.CIv.P.** 4(d)(2)(F). If the defendant does not comply with the waiver request, "the court shall impose costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown." **Fed.R.Civ.P. 4(d)(2)(G).**

Here the Court finds that Swain has shown good cause for failing to comply with the waiver request. First, Swain asserts (though an affidavit) that she never received a certified letter containing a request for waiver of service. Second, a copy of the certified letter that Brown sent to Swain reveals that the letter was returned as "unclaimed." Brown has not demonstrated that Swain actually received the request for waiver and that she intentionally ignored the request. Therefore, the Court will not assess costs against Swain. Accordingly, the Court DENIES Brown's request for recovery of costs against Defendant Kathleen Swain for failure to waive service of summons (Doc. 35).

IT IS SO ORDERED.

Signed this 19th day of October, 2000.

/s/ David R. Herndon
DAVID R. HERNDON
United States District Judge

[Doc. 43]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. PAUL H. O'NEILL[1], Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and
KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH

MEMORANDUM AND ORDER
(Filed July 11, 2001)

Herndon, District Judge:

I. Introduction and Procedural History

This matter comes before the Court on Defendants' motion to dismiss Counts VII and XIV and for partial summary judgment on Counts XII and XIII (Doc. 53) and Defendants' motion to dismiss Counts I, II and III and for partial summary judgment on Counts IV, VI and VII (Doc. 76). Based on the reasons stated herein, the Court grants Defendants' motions.

In September 1999, Robbyn Brown, an employee of the Internal Revenue Service ("IRS"), filed a fourteen-count *pro se* complaint against Lawrence H. Summers, Secretary of the Treasury, Dorian Morely, Director Regional Complaints Center, Deloris Featherstone, and Kathleen Swain (Doc. 1). Brown brings this suit pursuant to Title VII of the Civil Rights Act of 1964, **42U.S.C.§ 2000e *et seq.*, 42 U.S.C. § § 1981, 1981a, 1983** and **1985**, and violations of both the

Freedom of Information Act, **5 U.S.C. § 552**, and the Privacy Act, **5 U.S.C. § 552a**. In Counts I through VII and IX through XI, Brown alleges that Defendants discriminated against her on the basis of her race (African American) and her gender. In Count VIII, Brown alleges that Featherstone and Swain conspired to deny her due process and equal protection under the law in violation of **42 U.S.C. § § 1981,1983** and **1985**. In Counts XII and XIII, Brown alleges that Defendants violated the Freedom of Information Act, **5 U.S.C. § 552** ***et seq.***, and the Privacy Act, **5 U.S.C. § 552a** ***et seq.***, by disclosing the contents of Brown's discrimination action and stating false information to colleagues. Lastly in Count XIV, Brown alleges that Morely improperly rejected her administrative claims in violation of **42 U.S.C. § § 1981** and **1983**.

On April 11, 2000, the Court granted in part and denied in part Summer's motion to dismiss (Doc. 19). The Court dismissed with prejudice Brown's Freedom of information claims, and denied the motion as to the Privacy Act claims. Now before the Court are Defendants' motions to dismiss and for partial summary judgment.

It is significant to note that Brown is proceeding *pro se* herein. The pleadings of *prose* litigants should not be held to the same stringent standards as pleadings drafted by formally trained lawyers; instead they must be liberally construed. ***See Kyle II v. Patterson,* 196 F.3d 695, 697 (7tb Cir. 1999) (citing *Wilson V. Civil Town of Clayton, Ind.,* 839 F.2d 375, 378 (7th Cir. 1988) (pro se complaints/pleadings are to be liberally construed.)) *See also Cruz V. Beto,* 405 U.S. 319, 322 (1972).**[2]

II. Facts[2]

[2] The facts are taken from Brown's complaint and the evidence submitted

Brown is a Certified Public Accountant who worked for the IRS at the Fairview Heights, Illinois office as an Internal Revenue Agent. Brown maintains that she was discriminated against because of her race and her gender. She claims that she realized that she was being discriminated against on or around May 7, 1996, when she learned that she did not get a promotion. She also alleges that on various occasions between 1994 and 1996 her former manager, Richard Knowles, allegedly did the following: (a) assigned selective return work assignments to other co-workers; (b) did not assist her with employee development; (3) issued her an evaluation for the period covering 3/2/94 through 3/1/95 that lacked uniformity and consistency; (4) publicly demeaned her; and (5) did not select her for the position of Internal Revenue Agent, GS-512-13 for Vacancy Announcement Number NPB 95-508MSL on or around May 8, 1996. Further, she contends that her other manager, Kathleen Swain, and Branch Chief, Deloris Featherstone, retaliated against her for contacting and engaging EEO counseling in May 1996. Specifically, she maintains that she was subjected to multiple workload/work in progress; she was subjected to 100% case file evaluations on closed cases; she was subjected to the imposition of work-related policies and procedures more harshly that other co-workers; she was denied acting manager assignments; and she was given an annual performance appraisal for the period covering 3/1/95 through 3/1/96. Brown also alleges that false and misleading testimony was used during her 1996 Evaluation.

Additionally, Brown alleges that Swain violated the Privacy Act by disclosing [3] portions of her EEO file without her consent to her co-workers Cheryl Pagan and

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by the parties. The allegations in Brown's complaint stem from actions that took place from 1994 to 1999, when she filed suit. The Court notes that almost all of the alleged instances in Brown's complaint do not contain specific dates.

Karen Hudgins. Lastly, she alleges that Morley denied her equal protection by "prematurely partially dismissing" her 1997 EEO complaint and refusing to investigate and dismissing her 1999 EEO complaint.

Motion to Dismiss

Federal notice pleading requires a plaintiff to set forth in his complaint "a short and plain statement... that will provide the defendant fair notice of the claim." ***Scott V. City of Chicago,* 195 F.3d *950,* 951 (7th Cir. 1999)(citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 1J.S. 163, 168 (1993))**. In deciding whether to grant a motion to dismiss for failure to state a claim under **FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6),** the court accepts as true all well-pled allegations and resolves in favor of the plaintiff all reasonable inferences. ***Marshall-Mosby V. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000). *See also Autry V. Northwest Premium Services, Inc.,* 144 F.3d 1037, 1039 (7th Cir. 1998)**. Dismissal under **Rule 12(b)(6)** is proper only if the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. ***Conley V. Gibson,* 355 U.S. 41, 45-46 (1957). *Accord Lifanda v. Elmhurst Dodge, Inc., 237* F.3d 803,806 (7th Cir. 2001); *Looper Maintenance Service, Inc. V. City of Indianapolis,* 197 F.3d 908, 911 (7th Cir. 1999).**

IV. Analysis

A. Counts I, II and III

O'Neill argues that Brown's claims of sex and race discrimination under Counts I, II and III are not timely because she had not contacted the IRS EEO counselor within 45 days of the alleged discriminatory conduct as required

under **29 U.S.C. § 1614.105(a)(1)**. Brown responds that her May 7, 1996 contact with the EEO counselor covers the prior acts of discrimination because she [4] was not aware nor could have reasonably known that Mr. Knowles intentionally discriminated against her and other females and minorities in rating performance evaluations, developmental assignments and return assignments. O'Neill replies that Brown is attempting to tie prior alleged acts of discrimination to her failure to promote claim under Count V. The Court agrees with O'Neill.

"Exhaustion of administrative remedies is a prerequisite for bringing an action under Title VII charging federal discrimination." ***Pack V. Marsh,* 986 F.2d *1155,* 1157 (7th Cir. 1993)**. An individual who believes that he or she has an employment discrimination claim against the United States Government must initiate contact with an employment counselor within 45 days of the alleged discriminatory action. **29 C.F.R. § 1614.105;**[3] ***See also Foster v. Bentsen,* 919 F. Supp. 293, 295 (N.D. 111.1996)**. This deadline is construed as a statute of limitations and not as a jurisdictional prerequisite. ***Johnson V. Runyon,* 47 F.3d 911, 917 (7th Cir. 1995)(citing Rennie V. *Garrett,* 896 F.2d 1057, 1062-63 (7th Cir. 1990))**. However, the 45-day time limit may be extended:

> when the individual shows that he or she was not notified of the time limits and was not otherwise

[3] 29 C. F.R. § 1614.105 provides in part that: "(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to tiling a complaint in order to try to informally resolve the matter. (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action."

> aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. § 1614.105(a)(2).

Here, Brown's initial contact with an EEO counselor for her first EFO complaint was [5] on May 7, 1996. Therefore, any action on any specific claims of employment discrimination that occurred before March 23, 1996 (45 days prior to contact with the EEO Counselor) are time barred. **29 C.F.R. § 1614.105**. Brown does not contest the fact that she never contacted an EEO Counselor concerning the race or sex discrimination that she allegedly suffered prior to that time. She maintains that her circumstances fall within the 45 day time limit extension based on the "continuing violation" doctrine because she was not aware of the race and sex discrimination until she was denied the promotion in May 1996.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period." ***Selan V. Kiley,* 969 F.2d 560,564(7th Cir. 1992)**. Although there exist three viable forms of the continuing violation doctrine, Brown does not identify which one she relies upon to support her argument..[4]

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[4] There is some doubt over the propriety of applying the continuing violation doctrine where, as here, equitable tolling may be applied to a limitations period ***Moskowiitz v. Trustees of Perdue Univ., 5* F.3d 279, 282 (7th Cir. 1993)**. However, the doctrine continues to be applied. ***E.g., Koelscli v. Beltone Elecs.***

Presumably, Brown refers to the third form by arguing that the decision not to promote her was closely related to the other untimely acts. However, not only does Brown fail to show that the acts were closely related under the relevant factors, ***Selan*, 969 F.2d at 565**, she fails to meet the threshold circumstance for applying the third continuing violation theory: that the employer has *covertly* followed a practice of discrimination. ***Id.* at 565**. The Court finds that Brown relies on conclusory allegations, without supporting evidence, that she did not know that she was being intentionally discriminated because of her race and gender. Even if this Court were to find that the time limit should be extended in this case, it would be unreasonable to extend the time limit to encompass the two year time frame before Brown [6] applied for the promotion. Brown did not exercise due diligence in exploring her remedies for the discrimination she allegedly suffered. The Court concludes that Brown's circumstances do not fall within the time limit extension under **29 C.F.R. § 1614.105(a)(2)**. Therefore, Brown has not satisfied the statutory requirement of pursuing administrative remedies before filing a suit in federal court. Her failure to contact an FEO counselor clearly violates the 45-day time requirement. Accordingly, the Court **GRANTS *with prejudice*** O'Neill's motion to dismiss Counts I, II and III for failure to timely exhaust administrative remedies.

B. Counts VIII and XIV

In Count VIII Brown alleges that Featherstone and Swain conspired to deny her due process and equal protection in violation of **42 U.S.C. § § 1981, 1983 & 1985**. In Count XIV Brown alleges that Morley rejected her administrative claims in violation of **42 U.S.C. § § 1981 & 1983**.

***Corp.*, *46* F.3d *705*, 707(7th Cir. 1995).**

Defendants argue that these counts must be dismissed because Title VII is the exclusive remedy for a federal employee alleging discriminatory employment practices. Brown argues that Defendants are equitably estopped from advancing this position. The Court agrees with Defendants.

Under Title VII it is clear that the head of the relevant federal department or agency is the only appropriate plaintiff in a Title VII action brought by a federal employee. **42 U.S.C. §2000e-16(c) (in an employment discrimination suit against the federal government, "the head of the department, agency or unit, as appropriate, shall he the defendant"); *see also Ellis v. United States Postal Dept.*, 784 F.2d 835,838 (7th Cir. 1986); *McGuinness V. United States Postal Service,* 744 F.2d 1318, 1322 (7th Cir. 1984).** Here, Secretary O'Neill is the head of the appropriate government department - - *i.e.,* the Department of Treasury - - of which the IRS is a part. Accordingly, the only appropriate Title VII defendant is Secretary O'Neill, in his official capacity. [7] Therefore, Brown fails to state a claim in any of the counts that allege violations of Title VII against Morley, Featherstone and Swain.

In fact, because Title VII is a federal employee's exclusive avenue for relief from allegedly discriminatory employment practices, Brown fails to state a claim against Morely, Featherstone and Swain under any legal theory. This issue was seuled when the Supreme Court held that a federal employee could not sue a governmental agency for employment discrimination under both Title VII and § 1981. ***See Brown* v. *General Services Admin., 425* U.S. 820,835(1976).** The Court reasoned that the statute's "carefu1 blend of administrative and judicial enforcement powers" shows Congress' intent that the statute provide the exclusive means of granting relief for federal employees against the

government. ***Brown,* 425 U.S. at 832-33; *Espinueva v. Garrett, 895* F.2d 1164, 1165 (7th Cir. 1990); *see also Ellis,* 784 F.2d at 838 (claims for relief under 42 U.S.C. § § 1981 & 1985 and Fifth Amendment dismissed).** Brown has not established by law or fact that any of the claims contained in Counts VIII and XIV are independent of her Title VII employment claims. Therefore, the Court concludes as a matter of law that Title VII provides for Brown's exclusive remedy and the Court **GRANTS *with prejudice*** Defendants Featherstone, Swain and Morley's motion to dismiss Counts VIII and XIV.

V. Summary Judgment

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **FED. R. Civ. P.56(c); *Wyatt* V. *UNUM Life Insurance Company of America,* 223 F.3d 543, 545 (77th Cir. 2000); *Oates V. Discovery Zone,* 116 F.3d 1161, 1165 (7th Cir. 1997); *see also Celotex Corp. V. Catrett,* 477 U.S. 317, 322 (1986)).** The movant bears the burden of [8] establishing the absence of fact issues and entitlement to judgment as a matter of law. ***Wollin v. Gondert,* 192 F.3d 616,621-22 (7th Cir. 1999).** The Court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the non-movant. ***Schneiker v. Fords Insurance Co.,* 200 F.3d 1055, 1057 (7th Cir. 2000); *Baron V. City of Highland Park,* 195 1'.3d 333, 337-38 (7th Cir. 1999).**

In reviewing a summary judgment motion, the Court does not determine the truth of asserted matters, but rather decides whether there is a genuine factual issue for trial. ***EEOC V. Sears, Robuck & Co.,* 233 1'.3d 432, 436 (7th Cir. 2000).** No issue remains for trial "'unless there is sufficient

evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted...***Anderson V. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).** ***Accord Starzenski v. City of Elkhart*, 87 E.3d 872, 880 (7th Cir. 1996), cert. denied, 117 5. Ct. 683 (1997); *Tolle* v. *Carroll Touch, Inc.*, 23 F. 3d 174, 178 (7th Cir. 1994).**

This standard should be applied "with added rigor" in employment discrimination cases, in which intent and credibility are crucial issues ***Webb V. Clyde Choate Mental Health and Development Center*, 230 F.3d 991,997 (7th Cir. 2000); *Miller V. Borden, Inc.*, 168 F.3d 308,312 (7th Cir. 1999); *King V. Preferred Technical Group, Inc.*, 166 F.3d 887,890(7th Cir. 1999).** This standard reflects pronouncements that in employment discrimination cases, which often involve issues of motive and intent, summary judgment must be approached with caution. ***Huhn V. Koering Co.*, 718 F.2d 239, 242 (7th Cir. 1983) *Huhn*** relied on an earlier case which recognized that, although summary judgment is improper in employment discrimination cases which involve weighing of conflicting indications of motive and intent," where a plaintiff has no evidence of [9] discriminatory motive to "put on the scales for weighing," summary judgment *is* appropriate. ***Id.***

VI. Analysis

A. Count IV

In Count IV, Brown alleges that she was denied "reasonable supplies necessary in performing her duties while providing the same for similarly situated employees" and that her manager "Richard Knowles acting on behalf of

Defendant publicly demeaned Plaintiff and other female employees while not treating white males in said manner." (Doc. 1, p. 9).[5] O'Neill argues that summary judgment is proper because Brown has failed to establish a prima facie case of either race or sex discrimination. The Court agrees with O'Neill.

Title VII makes it unlawful for an employer to discriminate against an employee because of the employee's race or gender. **42 U.S.C. § 2000e *et seq***. The plaintiff must prove that she was a victim of intentional discrimination. ***St. Mary's Honor Center V. Hicks, 509* U.S. 502, 509 (1993)**. A plaintiff can satisfy her burden of proof in a race or sex discrimination case in two ways: through direct evidence of discriminatory intent or through indirect evidence demonstrated by the burden-shifting method presented in ***McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1 973). *Pasqua v. Metropolitan Life ins. Co.*, 101 F.3d 514,516 (7th Cir. 1996); *Von Zuckerstein v. Argonne Nat 'I Lab.*, 984 F.2d 1467,1472 (7th Cir. 1993)**. Here, Brown has not presented direct evidence of discrimination, and thus the Court turns to the burden-shifling method of ***McDonnell-Douglas***. [10]

The first step for Brown under the ***McDonnell-Douglas*** method is to establish a prima facie case of race or sex discrimination. ***Gonzalez y. Ingersoll Milling Machine Co.*, 133 F.3d 1025, 1032 (7th Cir. 1998); *Pasqua*, 101 F.3d at 516**. To establish a prima facie case of race or sex discrimination, Brown must show: (1) she is in a protected class; (2) she is qualified for her position; (3) she suffered an

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[5] The Court notes that Count IV contains other allegations pertaining to instances involving other women and minorities who are not parties to this lawsuit. Thus, the Court finds these allegations are not proper to support Brown's individual claims of race and sex discrimination.

adverse employment action; and (4) that others, similarly situated but not of the protected class, were treated more favorably. ***Morrow v. Wal-Mart Stores, Inc.*, 152 F.3d 559, 561 (7th Cir. 1998)(citing *Geier V. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996)); *Spearman* V. *Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).**

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. ***Cowan v. Glenbrook Sec. Servs., Inc.*, 123 F.3d 438, 445 (7th Cir. 1997).** Then the burden shifts back to the plaintiff to show the defendant's reason is in fact pretext for discrimination. ***Bahl v. Royal Indemnity Co.*, 115 F.3d 1283, 1290 (7th Cir.1997).** The ultimate burden of proof remains with the plaintiff at all times. See ***Kirk v. Federal Property Management Corp.*, 22 F.3d 135, 138 (7th Cir. 1994).**

First, the Court must determine whether Brown has established a prima facie case of either race or sex discrimination. O'Neill maintains that Brown cannot set forth a prima facie case of either race or sex discrimination because she neither suffered an adverse employment action nor did her employer treat similarly situated employees outside the protected class more favorably.[6] In response to O'Neill's motion for summary judgment on Count IV, Brown contends "Count IV speaks to Mr. Knowles' bias towards women and minorities and their performance or what he [11] believes to be their lack thereof. These are disputed genuine issues of material facts." (Doc. 91, p.7). Even construing Brown's allegations liberally and drawing all reasonable inferences and resolving factual disputes in favor of Brown, the Court concludes that Brown has failed to establish a

[6] The parties do not dispute that Brown has met the first two elements of the prima facie case.

prima facie case of either race or sex discrimination.

First, the Court finds that Brown has not established that she suffered an adverse employment action. The Seventh Circuit has defined an adverse action as follows:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion, evidenced by a decrease in salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Crady v. Liberty Nat. Bank & Trust Co., 993 **F.2d 132, 136 (7th Cir. 1993).**

Here, Brown asserts that "not receiving necessary supplies" and "being demeaned publicly" are adverse employment actions. The Court finds that these instances are not material and do not constitute an adverse employment action. These instances neither changed her responsibilities, decreased her wages and benefits nor affected her job title. "Not everything that makes an employee unhappy is an actionable adverse action." ***Smart V. Ball State University, S9*** **F.3d 437, 441 (7th Cir. 1996).** Moreover, the Court finds that the oral reprimand Brown received cannot be considered to implicate a sufficient "tangible job consequence []" so as to constitute an independent basis of liability under Title VII. ***See Sweeney*** **v.** ***West,*** **149 V.3d 550, 556 (7th Cir. 1998)("Absent some tangible job consequence accompanying [the] reprimands, we decline to broaden**

the definition of adverse employment action to include them."). These instances fall [12] short of the adverse action required to satisfy the prima facie case of either race or sex discrimination.

Further, the Court finds that Brown has not shown that similarly situated employees outside the protected class were treated more favorably. She does not name any other similarly situated employee that received "reasonable supplies necessary" or that was not "demeaned publicly." Accordingly, the Court **GRANTS** O'Neill's motion for summary judgment on Count IV.

B. Count VI

In Count VI, Brown alleges that in retaliation for her EEO involvement and to discourage her from pursuing her federally protected rights under Title VII Knowles issued her a performance evaluation for the period covering March 1, 1995 to March 31, 1996 that was, *inter alia,* in violation of the Internal Revenue Manual and Article I 2 Section 4 of the Collective Bargaining Agreement, and was "highly subjective, wreaked of retaliatory animus and was not fair." (Doc. 1, p.13). O'Neill argues that summary judgment is proper because Brown did not engage in statutorily protected activity and because she did not suffer any adverse employment action. Brown responds that her 1996 evaluation was the triggering event of several retaliatory actions directed against her.[7] Based on the following the Court finds that Brown has failed to establish a prima facie case of retaliation.

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[7] In her response, Brown raises allegations from Count VII and a new allegation that she was constructively discharged.

Title VII also "protects persons not just from certain forms of job discrimination but from retaliation for complaining about types of discrimination it prohibits."[8] ***Hamner v. St. Vincent*** **[13]** ***Hospital and Health Care Center, Inc.,*** **224 F.3d 701, 704 (7th Cir. 2000)(quoting** ***Miller v. American Family Mut. Ins.,*** **203 F.3d 997, 1007 (7th Cir. 2000); 42 U.S.C. § 2000e-3(a).** To establish a prima facie case of retaliation, a plaintiff must demonstrate: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse action by his employer; and (3) that there was a causal link between the protected expression and the adverse action. ***Hamner,*** **224 F.3d at 705;** ***Drake v. Minnesota Mining & Manufacturing Co.,*** **134 F.3d 878 (7th Cir. 1998);** ***see, e.g., McClendon v. Indiana Sugars, Inc.,*** **108 F.3d 789, 796 (7th Cir. 1997).** While the Seventh Circuit has defined adverse employment actions quite broadly, ***see McDonnell v. Cisneros,*** **84 F.3d 256, 258-59 (7th Cir. 1996),** it remains true that the adverse action must be material. ***See Rabinovitz v. Pena,*** **89 F.3d 482, 489 (7th Cir. 1996).** [N]ot everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" ***Smart,*** **89 F.3d at 441 (quoting** ***Williams v. Bristol-Myers Squibb Co.,*** **85 F.3d 270,274 (7th Cir.1996)).**

A successful prima facie case creates a rebuttable presumption of retaliation, ***cf. Miranda v. Wisconsin Power & Light Co.,*** **91 F.3d 1011 (7th 1996),** and shifts to the

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[8] The retaliation provision of Title VII provides that: "[i]t shall be an unlawful employment practice for an employer. . to discriminate against any individual because he has opposed any practice made unlawful employment practice by [Title VII]." **42 U.S.C. § 2000e-3(a).**

defendant a burden of articulating a legitimate, non-retaliatory reason for the challenged conduct. ***Knox,* 93 F.3d at 1334**. If the defendant does so, the presumption of retaliation dissolves, ***St. Mary's Honor Center,* 509 U.S. at 511-20 (1993)**, and the plaintiff must then establish that the employer's proffered reason is a pretext for discrimination. ***Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997)**. [14]

The Court finds that Brown has not established a prima facie case of retaliation. Brown cannot prove that she was retaliated against for complaining to the EEO counselor. Further, she cannot establish that she suffered an adverse employment action. Here, Brown was never fired or demoted. The March 1, 1995 to March 31, 1996 performance evaluation did not change her responsibilities, decrease her wages and benefits or affect her job title. In fact, Brown's performance evaluation was a good evaluation and not a negative evaluation. On a scale of one to five (with five being the highest), Brown received a score of four in the categories of workload management, application of accounting/auditing principles, issue identification, fact finding and customer relations and she received a score of five in the categories of application of law, written product and other duties and assignments.[9] When asked to expound on the certain aspects of the categories in which she received a rating of four, the Group Manager, Swain, did so in a September 30, 1996 memorandum to the NTFU Chapter 43 Chief Steward, Robert Graft. (Doc. 91, Exhibit N). Further, her performance evaluations from March 2, 1994 to March 1,1995 and March 1, 1995 to March 31, 1996 are the same. (Doc. 80, Exhibits II and JJ). The Court concludes this performance evaluation

[9] T he evaluation reveals that a score of four in the category means that Brown's work performance "exceeds fully successful" and that a score of five is "outstanding."

alone does not constitute an adverse employment action.[10] Thus, the Court finds that Brown has not [15] established a prima facie case of retaliation.[11] Accordingly, the Court **GRANTS** O'Neill's motion for summary judgment on Count VI.

C. Count VII

In Count VII, Brown alleges that:

> in retaliation for Plaintiff's FEO complaint, Plaintiff's Group Manager Kathleen Swain and Branch Chief, Deloris Featherstone subjected Plaintiff to a continuing course of intentional discrimination and retaliation which included increased work scrutiny via multiple workload and work in process reviews; 100% review on closed cases; the imposition of work-related policies and procedures more harshly that other co-workers; the denial of acting manager assignments while providing same for less experienced and less qualified co-workers. all [sic] of

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[10] Brown maintains that this performance evaluation is negative. The Court notes that a negative evaluation alone does not constitute an adverse employment action. ***See, Smart,* 89 F.3d at 442**. Further, courts are not to sit as a 'superpersonnel department' debating the merits of legitimate, nondiscriminatory criteria a business chooses to employ. ***Wade v. Lerner New York, Inc,* 243 F.3d 319, *325* (7th Cir. 2001) (citations omitted)**.

[11] In response to O'Neill's argument, Brown asserts that in response to a union grievance, the Defendants indicated that they were threatening her with a quasi-probationary status and that the Defendants did threaten her with probation. In support of this argument, Brown offers Exhibits M & N. However, a review of the pleadings and exhibits do not reveal that Defendants ever threatened Brown with either quasi-probationary status or probation.

which was with malice and reckless indifference to the federally protected rights of plaintiff.

(Doc. 1, p5. 13-14). O'Neill argues that summary judgment is proper because Brown has failed to establish a prima facie case of retaliation and discrimination. The Court agrees with O'Neill.

Again, Brown has failed to offer any evidence that she suffered an adverse employment action or that similarly situated co-workers received more favorable treatment She cannot prove that as a result of the personnel decisions, she suffered an adverse employment action under the law. Thus, the Court finds that summary judgment is proper on Count VII. Accordingly, the Court **GRANTS** O'Neill's motion for summary judgment on Count VII.

D. Counts XII and XIII

In Counts XII and XIII (the claims under the Privacy Act), Brown alleges that Swain,[16]
without her consent "willfully and maliciously unlawfully disclosed contents of Plaintiff's EEO complaints to Plaintiff's co-workers and other unidentified parties who were not entitled to receive it." (Doc. 1, p. 17). She also alleges that Defendants "did not keep accurate accounting of the date, nature, and purpose of each disclosure of Plaintiff's records and the name and address of the person or agency to whom the disclosures were made." (Doe. 1, p.18). O'Neill contends that summary judgment is proper because there is no evidence that the agency disclosure was of "records" from a "system of records" and because Brown has failed to prove an intentional violation or any damages from any alleged violations of the Privacy Act. Because the Court concludes that there is no evidence of improper disclosure, the Court

grants summary judgment on Counts XII and XIII.

The record reveals the following facts in relation to Brown's Privacy Act claims. Brown contends that Swain improperly disclosed the contents of her EEO file to Cheryl Pagan and Karen Hudgins. Brown admits that she does not know when or which contents of her EFO file were disclosed. (Brown Depo, p.242, lines 6-7, 19-21).[12] Brown further admits that she did not witness any of the alleged disclosures (Brown Deposition, p. 254, lines 24-25). In fact, Brown first learned of the alleged disclosures from Pagan while attending an IRS section 1203 training class in Springfield, Illinois in January 1999. (Brown Deposition, p.245, lines 1-7).

Pagan testified that she never saw an EEO file and that she physically did not see the contents of Brown's FF0 file. (Pagan Deposition, p.84, lines 20-21). Pagan stated that she does not have any knowledge of what was in the pink envelope that Swain placed on her desk because she [17] did not open the envelope. (Pagan Deposition, p.84, lines 24-25; p.86 lines l-25). Swain did not tell Pagan what the questions were in the envelope nor did she tell Pagan what responses were given to the questions alleged to be in the envelope. (Pagan Deposition, p.85, lines 3-11).

Brown further alleges that Swain also disclosed the contents of her EEO file to Hudgins. Hudgins maintains that Swain disclosed some of Brown's EEO file to her but not the

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12 When asked when the alleged disclosures were made, Brown responded: "The disclosures to Karen, Cheryl and Victor? They would be in a better position to answer that question." (Brown Deposition, p 242, lines 6-7). When asked to describe the items that were disclosed, Brown responded: "That would be better served as to each of these individuals, I believe. You are asking me to speculate." (Brown Deposition, p.242. lines 19-21).

entire file. (Doc. 60, Exhibit D, ¶ 4). During her deposition, Hudgins testified that she does not know whether or not the document she saw was part of an EEO file, but that she felt that it was related to an EEO file. (Hudgins Deposition p.34, lines 12-21).[13] In fact, Hudgins only remembers seeing one piece of paper. (Hudgins Deposition, p. 36,lines 11-13). She remembers seeing something about Swain flirting with a power of an attorney during an audit. (Hugdins Deposition, p.38 lines, 1-9). Hudgins does not have any direct knowledge of whether the paper she saw was part of an EEO filed because she does not know what is in an EE'O file. (Hudgins Deposition, p.40 lines 4-5).

In December1996, Swain was Brown's manager. Two times during December1996, Swain met with Brown and a representative of a taxpayer who was being audited by Brown. As a result of these meetings, Swain prepared a Performance Appraisal or a Job Visit ("JV") report. Brown received this JV report on January 1997 (Doc. 60, Exhibit F). In response to Swain's JV report, Brown submitted to Swain a five page document entitled "Response to Evaluation for On the Job Visits" (Doc. 60, Exhibit G). On page 5 of her response, Brown wrote "I went to enquire [sic] if additional information was needed and encountered Mrs. Swain stroking Mr. U----'s back." (Doc. [18] 60, Exhibit G). Upon receiving Brown's JV response, Swain called her immediate supervisor, Featherstone, and informed her of Brown's JV response and then faxed Featherstone a copy because Brown implied that Swain engaged in inappropriate contact with the power of attorney. (Doc. 60, Exhibit H).

Subsequently, Featherstone called Swain and told her that Brown's JV response should be removed from Brown's

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[13] Hudgins only assumes that what Swain shared with her was related to an EEO file. (Hudgins Deposition, ps 34-40).

Employee Performance File ("EPF") and returned to Brown. (Doc. 60, Exhibit H). Featherstone followed this verbal instruction to Swain in a written memorandum addressed to Brown through the manager of the exam group. (Doc. 60, Exhibit H). The last sentence of the memorandum stated that Brown's JV response would not be made part of her EPF file (Doc. 60, Exhibit II). Swain returned to Brown her JV response. (Doc. 60, Exhibit H).

Sometime in 1997, an EEO investigator approached Swain and presented her with Brown's affidavit and asked her to respond to it. (Doc. 60, Exhibit J). This was the only portion of Brown's EEO file that Swain saw; it did not contain any references to Swain's alleged inappropriate conduct with the taxpayer representative. (Doc. 60, Exhibits H & K). Then in mid- 1999, Swain was investigated by the Treasury Inspector General for Tax Administration based on the allegation that she had disclosed EEO related documents involving Brown to Pagan and Hudgins. (Doc. 60, Exhibit H).

The Privacy Act provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains...." **5 U.S.C. § 552a(b)**. To survive a summary judgment motion on [19] a claim for unlawful disclosure under **5 U.S.C. § 552a(g)(1)(D)**, a plaintiff must advance evidence to support a finding of four necessary elements: (1) the information is covered by the Act as a "record" contained in a "system of records": (2) the agency "disclosed" the information; (3) the disclosure had an "adverse effect" on the plaintiff; and (4) the disclosure was "willful or intentional." ***Quinn v. Stone*, 978 F.2d 126, 131 (3rd Cir. 1993); *Gowan* v. *U.S. Department of Air Force*, 148 F.3d 1182 (10th Cir.**

1998).

Under the Privacy Act, a "record" is defined as:

> any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a voice print or a photograph.

5 U.S.C. § 552a(a)(4). The definition of a "system of records" under the Act is:

> A group of records under the control of the agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

5 U.S.C. § 552a(a)(5).

The Court finds that Brown has not advanced any evidence to support a claim of improper disclosure. Specifically, she has not shown that the information that was disclosed was a "record" from a "system of records." The information that Swain allegedly disclosed was obtained independently when Brown decided to make an allegation against Swain in a memorandum directed specifically to Swain. As the JV Response was not made a part of Brown's EEO file, it was never in a system of records. The single alleged disclosure to Hudgins relates to an issue in which Brown [20] complained about physical contact between

Swain and a representative of a taxpayer during an audit with Brown. The only alleged disclosure relates to a matter that Swain had personal knowledge of outside a "system of records" Moreover, Pagan never saw any records and Brown has no direct knowledge of the alleged disclosures. The single piece of paper that Hudgins saw cannot be connected to any "system of records" in Brown's EEO file. Thus, the Court concludes that there are no genuine issues of material fact regarding a violation of the Privacy Act. Therefore, summary judgment is proper on Counts XII and XIII of Brown's complaint.

VII. Conclusion

Accordingly, the Court **GRANTS** Defendants' motion to dismiss Counts VIII and XIV and for partial summary judgment on Counts XII and XIII (Doc. 53) and Defendants' motion to dismiss Counts I, II and III and for partial summary judgment on Counts IV, VI and VII (Doc. 76). The Court **DISMISSES** ***with prejudice*** Counts I, II, III, VIII and XIV of Brown 's complaint and **DISMISSES** ***with prejudice*** Featherstone, Swain and Morley as Defendants in this matter. Further, the Court **DIRECTS** the Clerk of the Court to enter judgment in favor of Defendant O'Neill and against Robbyn Brown on Counts IV, VI, VII, XII and XIII. Counts V, IX, X and XI remain for trial. The Court **SETS** the Final Pretrial Conference for October 5, 2001 at 2:00 p.m.

IT IS SO ORDERED.
Signed this 11th day of July, 2001.
/s/ David R. Herndon
DAVID R. HERNDON
United States District Judge

[21] [Doc. 94]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBBYN BROWN, Plaintiff vs. LAWRENCE H. SUMMERS, Secretary of the Treasury, DORIAN MORLEY, Director, Regional Complaints Center, DELORIS FEATHERSTONE, Manager, and KATHLEEN SWAIN, Manager, Defendants.

No. 99-CV-0745-DRH
DISCOVERY DEPOSITION OF CHERYL PAGAN

Taken on behalf of Plaintiff
November 17, 2000

Sarah L. Paszkiewicz, RPR
Certified Shorthand Reporter
License No. 084-004225

Q. (By Ms. Brown) I'm going to refer to it.
A. Okay.
Q. The question posed to you by the counselor -- this is Plaintiff's Exhibit 1. The first question, can you read that for the record, please?
MR. LLEWELLYN: What are you having her do?
MS. BROWN: She's reading it into the

record, question Number 1.
A. Have you heard Kathleen Swain make derogatory or slanderous remarks about any members of her staff.
Q. And you responded?
A. Yes.
Q. Can you elaborate for us, please? You can review it, if you'd like.
A. I shouldn't just read it. I'll just tell you.
MR. LLEWELLYN: Don't just read it. It speaks for itself. You can take the time to read the entire document if you wish to take the time to read the entire document.
Q. (By Ms. Brown) Sure, go ahead. No

problem. There's some other pages.
A. I almost forgot what the question is now.
Q. That's okay. If so I apologize. I'm not too familiar with your writing, so if you would tell us in your own words exactly when or if Kathleen Swain made derogatory or slanderous remarks about members of her staff.
A. We were at the Fairview Heights office and there was a joint group meeting, and we were in the conference room, the one that expands from two small rooms to one big one on the exam side. And I don't recall if it was either break or lunch, but we were breaking after the meeting.
Q. Okay.
A. And one of the other employees was talking about a case and about still having it open.
Q. Okay.

A. And Kathleen made the remark that, you know, well, that's one of Robbyn's cases and that's why it's still open. And she commented about your -- Robbyn's cases having high time and that -- that Robbyn went into too much detail and examined every little expense regardless of what

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it was, even down to pennies and dollars and stuff that shouldn't really be looked at, and especially in travel and entertainment expenses.

Q. Okay. Ms. Pagan, are you a group manager?

A. No.

Q. Do you hold any supervisory type of position?

A. No.

Q. So when you were in this room, this was within ear shot, was she telling you this directly or was she just speaking to another employee and you overheard it?

A. She was speaking to another employee that had that case that she was referencing, and I'm -- it wasn't a hushed conversation. It was a very open conversation as people were leaving the room.

Q. Okay.

A. The room was not empty.

Q. I understand. Who was this other employee?

A. That, I'm sorry I don't recall at this point.

Q. That's okay. That's fine. To the

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best of your recollection, was this another

manager she was speaking to?
A. No. It was the employee that -- that was working the case.
Q. Would this other employee have been involved in EEO type of matters with respect to the matter that's before us, to your knowledge?
MR. LLEWELLYN: Objection, relevance.
Q. (By Ms. Brown) You can still answer the question. It will just be noted that he's objecting.
A. Well, I'm not sure I understand the question.
Q. Okay. This was a group meeting then, so when you say group meeting, this would have been members of the group that Kathleen Swain managed?
A. Yes.
Q. That would have been a group formerly known as Group 8, correct?
A. Group 8.
Q. To the best of your knowledge, are any of those employees or were any of those employees at the time EEO investigators?
A. Not to my knowledge.

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Q. Okay. Was this a group meeting dealing with EEO matters?
MR. LLEWELLYN: I'm going to object to the relevance. This is -- There is no evidence that this conversation was an EEO related matter, but you can answer.
Q. (By Ms. Brown) You can continue to answer. It will just be noted that he's objected to it.
A. Not that I recall. I just recall it

just being a normal group meeting.
Q. I understand. The second question is, did you -- We're reading from Plaintiff's Exhibit 1. Would you read the second question that was posed to you?
A. Did you hear Kathleen call any member of her staff "Judas," and the response to that is yes.
Q. Can you elaborate on that, please?
A. Yes. It was -- Kathleen was down in the Carbondale office, I don't recall for what matter at this point, but she was still group manager. And it was December 1998, and I asked her if Robbyn was back from maternity leave and if Robbyn had brought the baby in for everyone to

see.
And Kathleen indicated -- she said that -- she talked about the baby. She said that she didn't say much or touch the baby, she said because you know how Robbyn is. And then after she said you know how Robbyn is, she said everyone has their Judas.
Q. Would this be the Judas as referred to in the Bible? Is that the way you took it?
A. That's the way I understood it.
Q. One of the disciples or former disciples of --
A. Who betrayed Jesus.
Q. Okay. Number 3, can you go over that one, please? I'm sorry. Before we do that, can we go back to Number 1, if you could please.
When these comments were made, I know the question was posed did she make derogatory or slanderous remarks about members of her staff.

Were these comments complimentary? Did you perceive them to be complimentary?

A. No.

MR. LLEWELLYN: Objection. That's asking her -- calling for speculation and perception.

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Q. (By Ms. Brown) Can you answer the question, please?

A. I did not find it complimentary. In fact, I was surprised to hear the comment and I thought it was improper to me as an employee to be subjected to those comments.

Q. I understand.

A. It made me uncomfortable.

Q. You stated earlier that you were already in the group when Ms. Swain came to be the manager of that group?

A. Yes.

Q. So then have you worked for other managers of that particular group prior to Ms. Swain?

A. Yes.

Q. Who were you former managers?

A. My first group manager, it was the old Springfield district, because I transferred down here in December of '84, from what was formerly known as the Chicago district.

Q. Okay.

A. And when I came down here in December of '84 to the Carbondale office, Les Dalen, he was originally out of Mt. Vernon Oil and Gas, was

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the group manager. And then after Les Dalen

left, our next group manager for Group 8 was Lloyd Dinkleman, and then after Lloyd left the position, he went back to the field as large case agent, Yolanda Carruthers Thorpe became our group manager of Group 8.

Q. Okay.

A. And then after she stepped down and went back to the field, Kathleen Swain became our group manager.

Q. So it's Les Dalen, Lloyd Dinkleman?

A. Uh-huh.

Q. And then?

A. Yolanda Carruthers Thorpe, and then Kathleen Swain.

Q. You stated earlier you've been with the service over 20 years?

A. Yes, that's correct.

Q. In the past have you filed a complaint -- Did you ever file a complaint against Ms. Thorpe for retaliation or reprisal?

MR. LLEWELLYN: Object to the relevance.

A. No.

Q. (By Ms. Brown) Okay. What about

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Mr. Dalen?

A. No.

Q. Same question for Mr. Dinkleman?

A. No.

MR. LLEWELLYN: Same objection.

Q. (By Ms. Brown) Okay. So prior to Ms. Swain you have no history of filing a union grievance or EEO complaints alleging retaliation or reprisal?

MR. LLEWELLYN: Asked and answered.

Objection, asked and answered. You can answer.
Q. (By Ms. Brown) You can answer.
A. No, I hadn't. The one with Kathleen was the first one.
Q. In over 20 years of service?
A. Yes.
Q. If we could please, if you would read Number 3.
A. Did you hear Kathleen say that any member of her staff had been dumped on her because she, Kathleen, was a new manager.
Q. And you responded?
A. Yes.
Q. Could you please elaborate for the record?

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A. Myself and my husband, revenue officer Pagan and group manager Kathleen Swain were having lunch at Hunan's, which is a Chinese restaurant in Carbondale, and Kathleen was complaining the whole lunch time about Robbyn filing the DEO complaint against her and how it was frivolous. And she said that Robbyn had filed a grievance and didn't get very far with that so therefore Robbyn decided to file a DEO complaint.
And she said that Robbyn had been dumped on her, which was Kathleen Swain, by Richard Knowles because Kathleen was a new group manager and that Richard wanted to get rid of Robbyn because Robbyn was a troubled employee.
Q. Those were the words that she used?
A. Yes, that you were a troubled employee.
Q. Okay. When she was telling you and

you say your husband, Victor Pagan, Mr. Pagan was a revenue officer in Carbondale as well?
A. Yes.
Q. And he's been employed with the service how long?
A. Since April of 1974.

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Q. Okay. When she stated these things what was your response? How did it make you feel?
A. Well, it made me uncomfortable. And I don't recall having much to say about it.
Q. Did you and Mr. Pagan have the opportunity to discuss this conversation with Ms. Swain after the fact?
MR. LLEWELLYN: What part of the conversation?
Q. (By Ms. Brown) The part of the – conversation where she told her that Robbyn Brown was dumped on her because she was a new manager, just to the best of your recollection?
A. Boy, I don't recall discussing it again with her. I was mainly just listening that day.
Q. That's fine. Can we go on to Number 4?
A. Sure.
Q. Would you read that, please?
A. Did Kathleen share an EEO file with you?
Q. And you responded?
A. Yes.

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Q. And the second part was if so who's

file was it, and you responded?
A. Robbyn Harris-Brown.
Q. What exactly did she share with you, Ms. Pagan?
A. Let me think how I want to word this.
Q. That's fine. Take your time.
A. The day she shared this with me it was the same day that we were at Hunan's.
Q. For lunch?
A. For lunch, where she was discussing the DEO complaint and what she shared with me, before we left for lunch, and she told me that she had something she wanted me to read and check for spelling and to see if her responses that she had written in this document were logical and answered the questions correctly, because all morning long she had been talking about the DEO complaint throughout the office and complaining about it, and she had been working on the questions that the DEO investigator had left with her at the computer that we use. We call it the library computer.

And so anyway, we left for lunch and as we were going out the door, she asked me, you

know, when we got back would I proof it for spelling and check it for her responses. And I said yes, because at that point I didn't know what it was.

And we came back from lunch, and I either went to the ladies' room or outside for a cigarette, I don't know which or both, because that's my normal habit before I go back in, and Victor, my husband, and Kathleen went on back into the office.

And when I came back to my desk, there was a pink envelope that says to be opened by addressee only on my desk on top of my other paperwork that I had been working on that morning. And I asked Kathleen if she had put that there and if this is what she wanted me to read. And she said yes. And I said well, what is it, because I was a little concerned because it was in a pink envelope. Being in service you know what a pink envelope is.

And she told me and I didn't see what was actually inside the envelope, only what she told me, she said it was the questions that the DEO investigator had left regarding Robbyn's DEO complaint and her responses to those questions.

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And I laid it back on my desk for a moment because I had gone over to the computer where she was working, and then I asked Victor, my husband, about that because I was concerned that -- he had been a former DEO investigator. And I said I can't read this, can I, and he told me no.

And so then I went and gave it back to Kathleen, and she came over by my desk and I told her -- she wanted to know why not. I said well, I can't read it because it's confidential and if anyone were to ever ask me if I had any knowledge or read it, I would have to tell them the truth and say yes, and I asked her not to tell me anymore about the DEO investigation, and at that point she dropped it.

Q. You mentioned earlier that she was going around the office talking about this in Carbondale.

A. Yes.
Q. Now, Ms. Swain didn't actually work in the Carbondale office; is that correct?
A. No. She was -- Her office was officially in Fairview Heights, but she would come down periodically because there were group

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members in the Carbondale POD of Group 8 and she was the manager, so...
Q. So it was somewhat of a satellite office then?
A. Yes.
Q. She operated or she managed two -- actually two locations?
A. Yes, two PODs.
Q. Okay. POD, would that --
A. Post of duty.
Q. Okay. You stated that she was going around the office talking. Were there other people -- other employees there besides yourself -- on that particular day besides yourself and Mr. Pagan?
A. Yes. Karen Hudgins, a revenue agent, was in the office that day.
Q. Any other individuals?
A. I'm not 100 percent sure on that.
Q. You stated earlier that at one point you were the Hispanic program manager, which is a collateral EEO assignment.
A. Yes.
Q. Have you been trained in any EEO processes under that -- in that particular

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position?